March 25, 2002

TO: Chief Justice Maura D. Corrigan

FROM: William J. Giovan, Chair, Advisory Committee on the Rules of Evidence

RE: Proposed Amendments to MRE 703

Dear Chief Justice Corrigan:

As I understand, the Supreme Court will be publishing for comment two alternative proposals for the amendment of MRE 703. If I may, I will first recapitulate why there are two versions, and then explain my position why one is preferable to the other.

The first version, Alternative A, is the one recommended by the Advisory Committee in its report of August 7, 2000. As amended, the rule would read:

Rule 703. Bases of Opinion Testimony by Experts

> The facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence. This rule does not restrict the discretion of the court to receive expert opinion testimony subject to the condition that the factual bases of the opinion be admitted in evidence thereafter.

To accommodate two difficulties raised regarding the proposed amendment, it was later recommended that two exemptions be added to MRE 1101, "Applicability." One of them would exempt a Friend of the Court Report from the rules of evidence so that the report of a neutral child custody expert, if requested by the court, could be received and evaluated by the judge in a custody dispute. The other would allow a mental health expert to rely on hearsay historical data in preliminary commitment hearings under the Mental Health Code.

After the submission of the above proposals, I was asked to participate in drafting an alternate amendment to Rule 703 (Alternative B), with the object of more precisely embodying the original intent of the present Michigan rule.

To identify that intent, let's start with the language from the federal Advisory Committee note that characterized the original rationale for promulgating the federal rule, originally adopted in 1975 and recently amended effective December 1, 2000:

> Thus a physician in his own practice bases his diagnosis on information from numerous sources and of considerable variety, including statements by patients and relatives, reports and opinions from nurses, technicians and other doctors, hospital records, and X rays. *Most of them are admissible in evidence, but only with the expenditure of substantial time in producing and examining various authenticating witnesses.* The physician makes life-and-death decisions in reliance upon them. His validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes. (Advisory Committee note, emphasis supplied.)

Thus the key characteristics of the evidence that would not require independent proof was that it was (1) highly reliable and (2) provable anyway by business records, but only with the expense of calling authenticating witnesses. The rule had to characterize in some way the evidence that would qualify, and the original federal rule did it this way:

> **FRE 703. Bases of Opinion Testimony by Experts.**
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> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. *If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject,* the facts or data need not be admissible in evidence. (Emphasis supplied.)

As our Advisory Committee's report notes, the Michigan Supreme Court, in promulgating MRE 703 in 1978, took a somewhat different approach. They understood that what experts "reasonably rely on" could be the crux of the litigation, and the Court therefore rejected that as a test for justifying opinion based on facts not in evidence. The trial judge is the logical person to determine what are the true disputes, the Court concluded, and therefore the judge – not a vague phrase – should determine when underlying facts need to be independently proved in order to justify an expert opinion. Accordingly, the Court phrased the extant rule this way:

> **MRE 703 Bases of Opinion Testimony by Experts**
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> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. *The court may require that underlying facts or data essential to an opinion or inference be in evidence.* (Emphasis supplied.)

Subsequent experience demonstrated that both the federal and Michigan formulae for identifying the kind of evidence that didn't have to be proved to support an opinion came to grief. In the federal jurisdiction what experts "reasonably rely upon" was such an expansive standard that it came to include almost anything, including, for example, street talk reported on the stand by policemen in criminal cases. The Michigan rule, on the other hand, affords no specific standard for the judge, and the practice today is that the court's discretion is neither invoked or exercised, with the result that, not only is the expert opinion received, but the inadmissible foundation evidence is

itself disclosed, contrary to the original intent of both rules.

Accordingly, the challenge was to find more suitable language to capture the original intent of the Michigan rule, which I will characterize this way: the avoidance of the needless consumption of time and expense consumed by obstructionist objections to foundation facts that are highly reliable and provable in any event by calling authenticating witnesses. Accordingly, Alternative B was drafted to read this way:

Rule 703. Bases of Opinion Testimony by Experts

> (a) Except as otherwise provided in subdivision (b), the facts or data in the particular case upon which an expert bases an opinion or inference must be admissible and admitted in evidence.
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> (b) If the court finds that the proponent of an expert opinion or inference has shown that there is no good faith basis for contesting the truth or accuracy of specified inadmissible or unadmitted facts or data in the particular case, the court may admit an expert opinion or inference that is based on those facts or data. The proponent may not disclose the inadmissible or unadmitted facts or data to a jury. If the court is the finder of fact, the court may consider those facts or data only for the purpose of determining whether the required threshold is established.

The improvement of Alternative B over the present rule lies in its presumption against evidence based on nonadmissible facts and the casting of the burden upon the proponent of the opinion to show justification for an opinion that relies on facts not proven . It is true that what is a "good faith basis" may be difficult to determine in a given instance, but that language at least provides an identifiable standard for the court, and one, I suggest, that is more pertinent to the goal of reliability than what has been used before.

Having explained the rationale of Alternative B, and conceding that it is a great improvement over the present rule, let me explain why I believe that Alternative A, the original proposal of the Advisory Committee, together with the proposed adjustments to MRE 1101, is far preferable to Alternative B:

1. Alternative B, in the end, is a bad idea. It is a bad idea for the same reason that Rule 703 was a bad idea in the first place. Originating with the laudable goal of eliminating petty foundation objections to opinion testimony, it resulted in the wholesale destruction of the hearsay rule in cases involving expert testimony. For the sake of nothing more than procedural convenience, it replaced a time-honored bright line foundation test for expert opinion with a standardless foundation requirement, so undefined that it is never used. The test used in Alternative B is somewhat more particular in identifying the ultimate goal, but it is itself essentially amorphous, and therefore likely to generate uneven results from courtroom to courtroom.

More important yet, there is no need to have an amorphous test with uneven results. The

exceptions to the rule against hearsay, developed through the experience of centuries, define the circumstances in which there is a guarantee of trustworthiness. Indeed, recent amendments to the rules of evidence afford additional ease in establish foundation facts for expert testimony, thus further eliminating the need that was thought to warrant Rule 703 in the first instance. While Alternative B is a vast improvement over the present rule, neither it nor any similar formulation will ever prove entirely satisfactory, because there is no way to make palatable the essential flaw of Rule 703, i.e., the acceptance of expert opinion based upon facts that are never proved.

If Alternative B is adopted and actually used, there are going to be a lot of pretrial hearings arguing about what foundation facts of experts are in good faith dispute, much to the consternation of trial judges. If the truth be told, trial judges *dislike* preliminary hearings about the admissibility of evidence, and with good reason. It brings everything to a halt. It is another complication in the already arduous process of trial. That's why neither the Michigan nor federal versions of Rule 703 worked in the first place. The bench can once again accept a defined foundation for expert testimony, as it did for centuries before 1978, but it is not likely to adapt with any consistency to a test for a foundation that has no definition other than an ideal.

2. The adoption of Alternative B will not mollify intransigent objections to the amendment of Rule 703. By now it seems evident that there is a core of those who would not tolerate *any* modification of Rule 703, notwithstanding that (a) the federal rule has already been amended, (b) many of the difficulties purportedly resulting from an amendment are nonexistent because statutory exceptions already enacted, and (c) legitimate concerns are addressed by the proposed amendments to Rule 1101. All that is left, then, is the resistance of those who insist on retaining the practice of having the rights of litigants determined on the basis of facts that are never proved.

Accordingly, Alternative B should not be adopted solely because we cannot quite get ourselves to dispose of the last vestige of the mistake wrought by Rule 703.